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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

8 Plaintiff(s),

9 v.

10 CHRISTOPHER SANGALANG, et al.,

11 Defendant(s).

Case No. 2:08-CR-163 JCM (GWF)

ORDER

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13 Presently before the court is petitioner Deandre Patton's abridged motion to vacate, amend,
14 or correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 707).

15 Also before the court is petitioner's motion to vacate, amend, or correct sentence pursuant
16 to 28 U.S.C. § 2255. (ECF No. 716). The government filed a response (ECF No. 720), to which
17 petitioner replied (ECF No. 722).

18 **I. Facts**

19 On April 2, 2010, a jury found petitioner guilty of one count of conspiracy to interfere with
20 commerce by robbery ("conspiracy to commit Hobbs Act robbery"), one count of conspiracy to
21 possess with intent to distribute cocaine, and one count of use of a firearm during and in relation
22 to a crime of violence or a drug trafficking crime under 18 U.S.C. § 924(c). (ECF No. 486).

23 On December 17, 2010, the court sentenced petitioner to 121 months imprisonment for the
24 conspiracy to commit Hobbs Act robbery and the conspiracy to possess with intent to distribute
25 cocaine convictions, to run concurrent.¹ (ECF No. 569). The court sentenced petitioner to 60
26 months imprisonment for the § 924(c) conviction, which by law had to run consecutively to the
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28 ¹ The court ordered these counts to run concurrently with case no. 2:08-cr-00140-KJD-LRL, with credit for 31 months and 2 days. (ECF No. 570).

1 other convictions. *Id.* Therefore, petitioner received a combined sentence of 181 months
2 imprisonment.

3 Petitioner timely appealed his conviction and sentence. On June 26, 2014, the Ninth Circuit
4 affirmed. (ECF No. 663).

5 On June 26, 2015, in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the Supreme Court
6 held that imposing an increased sentence under the residual clause of the Armed Career Criminal
7 Act (“ACCA”) violates due process. On April 27, 2016, the United States District Court for the
8 District of Nevada appointed the Federal Public Defender to represent defendants, including
9 petitioner, on the United States Sentencing Commission’s list of persons who may be eligible for
10 relief as a result of *Johnson*. On June 24, 2016, petitioner filed an abridged motion to vacate.
11 (ECF No. 707). On December 12, 2016, petitioner filed his complete motion to vacate, seeking
12 habeas relief under *Johnson*. (ECF No. 716).

13 **II. Legal Standard**

14 Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court
15 imposed the sentence “in violation of the Constitution or laws of the United States” 28 U.S.C.
16 § 2255(a). Relief pursuant to § 2255 should be granted only where “a fundamental defect” caused
17 “a complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also*
18 *Hill v. United States*, 368 U.S. 424, 428 (1962).

19 Limitations on § 2255 motions are based on the fact that the movant “already has had a fair
20 opportunity to present his federal claims to a federal forum,” whether or not he took advantage of
21 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 “is not designed
22 to provide criminal defendants multiple opportunities to challenge their sentence.” *United States*
23 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

24 **III. Discussion**

25 *a. Whether petitioner is eligible to seek relief under Johnson*

26 On April 18, 2016, the Supreme Court held that *Johnson* announced a new substantive rule
27 that has retroactive effect in cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257,
28 1267 (2016). Petitioner filed his abridged motion to vacate on June 24, 2016, within one year of

1 the court's decision in *Johnson*. Therefore, petitioner is eligible to apply for habeas relief pursuant
2 to the Supreme Court's decision in *Johnson*. See 28 U.S.C. § 2255(f) ("a 1-year period of
3 limitation shall apply to a motion under this section. The limitation period shall run from the latest
4 of— . . . (3) the date on which the right asserted was initially recognized by the Supreme Court, if
5 that right has been newly recognized by the Supreme Court and made retroactively applicable to
6 cases on collateral review . . .").

7 The government cites Federal Rule of Criminal Procedure 12 to argue that petitioner
8 waived the claim raised in his § 2255 motion by not bringing the claim in a pre-trial motion. (ECF
9 No. 720).

10 Multiple other courts in this district have rejected the government's procedural bar
11 arguments in habeas cases post-*Johnson*. See *United States v. Ebron*, no. 2:12-cr-00072-APG-
12 CWH-2, 2017 WL 3337260, at *2 (D. Nev. Aug. 3, 2017); *United States v. Hunter*, 2:12-cr-00132-
13 JAD-CWH-1, 2017 WL 3159985, at *2 (D. Nev. July 25, 2017); *United States v. Avery*, 3:02-cr-
14 00113-LRH-VPC, 2017 WL 29667, at *5 (D. Nev. Jan. 3, 2017). The court holds that petitioner
15 is not procedurally barred from bringing his claims. See *Ebron*, 2017 WL 3337260, at *2; *Hunter*,
16 2017 WL 3159985, at *2.

17 *b. Whether petitioner's § 924(c) conviction violates the Constitution's guarantee of due*
18 *process*

19 Petitioner argues that the predicate offense underlying his § 924(c) conviction is his
20 conviction for conspiracy to commit Hobbs Act robbery. (ECF No. 716). Petitioner asserts that
21 conspiracy to commit Hobbs Act robbery cannot qualify as a predicate "crime of violence" for
22 purposes of a § 924(c) conviction post-*Johnson*. *Id.*

23 The government does not substantively respond to petitioner's contention that the predicate
24 offense in this case underlying petitioner's § 924(c)(3) conviction was conspiracy to commit
25 Hobbs Act robbery. See *generally* (ECF No. 720) (containing a single reference to the whether
26 conspiracy to commit Hobbs Act robbery was the predicate offense: "(3) that the conspiracy to
27 commit Hobbs Act robbery which may have served as a predicate for his § 924(c) conviction does
28 not qualify as a 'crime of violence'"). Therefore, the government has waived its right to assert
that conspiracy to commit Hobbs Act robbery was not the predicate offense underlying petitioner's

1 § 924(c) conviction. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (holding that failure
2 to address an argument in a responsive filing constituted waiver).

3 *i. Whether conspiracy to commit Hobbs Act robbery qualifies as a predicate*
4 *crime of violence under § 924(c)(3)*

5 Petitioner maintains that his § 924(c) conviction relies on the statute’s residual clause,
6 which is unconstitutional in light of *Johnson* and the Ninth Circuit’s decision in *Dimaya v. Lynch*,
7 803 F.3d 1110 (9th Cir. 2015). (ECF No. 716). The government responds that the holdings in
8 *Johnson* and *Dimaya v. Lynch* are inapplicable to the case at bar, which arises out of a conviction
9 pursuant to § 924(c). (ECF No. 720).

10 *A. Whether § 924(c)’s residual clause is unconstitutional in light of*
11 *Johnson and Dimaya*

12 In *Johnson*, the Supreme Court considered whether the ACCA violates due process. *See*
13 *generally* 135 S.Ct. at 2555. Under the ACCA, “a defendant convicted of being a felon in
14 possession of a firearm faces more severe punishment if he has three or more previous convictions
15 for a ‘violent felony’ a term defined to include any felony that ‘involves conduct that presents a
16 serious potential risk of physical injury to another.’” *Id.* (quoting *Begay v. United States*, 553 U.S.
17 137, 141 (2008)). The inclusion is commonly referred to as the ACCA’s “residual clause.”

18 The Court in *Johnson* highlighted two concerns regarding the ACCA’s residual clause.
19 First, the “ordinary case” inquiry mandated by the ACCA’s statutory text created “grave
20 uncertainty about how to estimate the risk posed by a crime.” *Id.* at 2557. Second, the residual
21 clause left unclear what level of risk amounted to a “violent felony.” *Id.* at 2561. The court held
22 the residual clause within the ACCA was void for vagueness, as “the residual clause produces
23 more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.* at 2558.

24 On April 17, 2018, the Court extended the holding in *Johnson* beyond the ACCA. *See*
25 *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (“*Dimaya*”). In *Dimaya*, the Court considered whether
26 the Immigration and Naturalization Act’s (“INA”) residual clause violated due process. *See*
27 *generally id.*

28 The INA “renders deportable any alien convicted of an ‘aggravated felony’ after entering
the United States.” *Id.* at 1210. Numerous types of offenses can qualify as an aggravated felony

1 under the INA, which often cross-references federal criminal statutes for definitions. *Id.* at 1211.
2 One such cross-reference is to 18 U.S.C. § 16 and “crime[s] of violence.” *Id.* Section 16 defines
3 a crime of violence as:

- 4 (a) an offense that has as an element the use, attempted use, or threatened use of
5 physical force against the person or property of another, or
- 6 (b) any other offense that is a felony and that, by its nature, involves a substantial
7 risk that physical force against the person or property of another may be used
8 in the course of committing the offense.

9 18 U.S.C. § 16. The former clause is often referred to as the elements clause, and the latter clause
10 is often referred to as the residual clause.

11 The Court in *Dimaya* reiterated *Johnson*’s two concerns regarding the ACCA’s residual
12 clause, noting that they applied equally to § 16. *Id.* at 1216 (“In sum, § 16(b) has the same ‘two
13 features’ that ‘conspired to make ACCA’s residual clause unconstitutionally vague.’”) (alterations
14 omitted). “§ 16(b) produces . . . ‘more unpredictability and arbitrariness than the Due Process
15 Clause tolerates.’” *Id.*

16 Here, the statutory language of § 924(c)(3) mirrors the language of 18 U.S.C. § 16, with
17 the lone exception of an additional comma in § 16. Therefore, the Supreme Court’s holding in
18 *Dimaya* that § 16’s residual clause is void for vagueness renders § 924(c)’s residual clause void
19 for vagueness. Accordingly, petitioner’s conviction cannot rest on the residual clause of § 924(c).

20 The government’s arguments in this case largely track the government’s arguments made
21 to the Supreme Court in *Dimaya*.² Here, the government’s first contention is that § 924(c) does
22 not contain the same list of enumerated crimes as the ACCA’s residual clause. (ECF No. 720 at
23 5). The Court in *Dimaya* noted that although the “confusing list of exemplar crimes” in the ACCA
24 did not aid in interpreting the statutory language, the residual clause’s constitutionality did not turn
25 on the existence of the enumerated offenses in the text. *See* 138 S.Ct. at 1221 (“To say that the
26 ACCA’s listed crimes failed to resolve the residual clause’s vagueness is hardly to say that they
27 caused the problem. Had they done so, *Johnson* would not have needed to strike down the clause
28 [in its entirety].”). Rather, the Court in *Johnson* held that the vagueness inherent in the ACCA’s

² The government filed its response brief in this matter before the court issued its decision in *Dimaya*.

1 residual clause stemmed from “the ordinary case requirement and a fuzzy risk standard.” *See id.*
2 These ill-defined inquiries form the foundation of § 924(c)(3)’s residual clause just as they formed
3 the foundation of the ACCA and the INA’s residual clauses.

4 Next, the government argues that holding the residual clause in § 924(c) to be
5 unconstitutional would “call into doubt the constitutionality of many other statutes.”³ (ECF No.
6 720 at 4-5). The Court in *Dimaya* was not swayed by this foreboding argument. *See id.* at 1214
7 (“The Court [in *Johnson*] emphasized that [the uncertainty as to the threshold level of risk] feature [of the
8 ACCA] alone would not have violated the void-for-vagueness doctrine. Many perfectly constitutional
9 statutes use imprecise terms like ‘serious potential risk’ (as in ACCA’s residual clause) or ‘substantial risk’
10 (as in § 16’s). The problem came from layering such a standard on top of the requisite “ordinary case”
11 inquiry.”).

12 Another argument the government espouses is that “[§] 924(c)(3)(B) does not go beyond
13 the elements of the offense to consider potential extra-offense conduct.” (ECF No. 720 at 6). The
14 dissent in *Dimaya* articulated this same theory in support of upholding the INA’s residual clause
15 in the face of a constitutional challenge. *See id.* at 1236-40 (Roberts, C.J., dissenting). However,
16 the Court in *Dimaya* referred to this argument, among others, as a “distinction without a
17 difference.” *Id.* at 1218. In the majority’s view, the ACCA’s residual clause and § 16(b)’s residual
18 clause asked courts to make the same inquiry into the riskiness of a crime. *See id.* at 1220 (“The
19 upshot is that the phrase ‘in the course of’ makes no difference as to either outcome or clarity.”).

20 The government argues that the Supreme Court has not had similar difficulty in construing
21 § 924(c)(3)(B) as it had construing the ACCA’s residual clause. (ECF No. 720 at 7-8). Faced
22 with a similar argument in *Dimaya*, the Court explained why the ACCA had resulted in a plethora
23 of conflicting caselaw while § 16(b) had not ostensibly caused the Court “comparable difficulties.”
24 *See id.* at 1223 (noting that the Court had received a number of petitions for certiorari in § 16(b)
25 cases that were summarily vacated and remanded after rulings on similar issues in the ACCA
26 context). The Court concluded that its experience with the ACCA “only supports the conclusion

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28 ³ The government styles its argument as an explanation of the Court’s holding in *Johnson*.
See (ECF No. 720 at 4-5).

1 that § 16(b) is too vague.” *See id.* at 1223. This court holds that the same logic applies to § 924(c).
2 *See id.* at 1223 (“The government would condemn us to repeat the past-to rerun the of ACCA tape,
3 as though we remembered nothing from its first showing. But why should we disregard a lesson
4 so hard learned?”).

5 The government also contends that “[The Ninth Circuit’s decision in] *Dimaya* [*v. Lynch*],
6 by its explicit terms, does not apply to section 924(c).” (ECF No. 720 at 9). However, in light of
7 the Supreme Court’s holding in *Dimaya*, there can be no doubt that § 924(c)’s residual clause
8 suffers from the same constitutional deficiencies that caused the Court to strike down the nearly
9 identical residual clause in the INA.

10 *B. Whether the conviction can be sustained under the force clause*

11 The Ninth Circuit has not yet decided whether conspiracy to commit Hobbs Act robbery
12 qualifies as a crime of violence under § 924(c)’s force clause.⁴ To qualify as a crime of violence
13 under the force clause, the predicate offense must contain as “an element the use, attempted use,
14 or threatened use of physical force against the person or property of another.” 18 U.S.C. §
15 924(c)(3)(A).

16 A conviction for conspiracy to commit Hobbs Act robbery requires proof of the following
17 elements: “(1) two or more people agreed to commit a robbery or extortion of the type discussed
18 in the Hobbs Act; (2) the defendant had knowledge of the conspiratorial goal; and (3) the defendant
19 voluntarily participated in trying to accomplish the conspiratorial goal.” *United States v. Si*, 343
20 F.3d 1116, 1123-24 (9th Cir. 2003). As the term is used in the Hobbs Act, robbery means the
21 taking of another’s property “by means of actual or threatened force.” 18 U.S.C. § 1951(b)(1).

22 Conspiracy to commit Hobbs Act robbery requires no more than an agreement to commit
23 robbery. As Judge Dorsey held in *Hunter*,

24 A defendant can enter this agreement without actually ‘using,
25 attempting to use, or threatening to use physical force against the
26 person or property of another For example, he could be
convicted based on an agreement to commit the robbery with
identities concealed by ski masks and purchasing a ski mask for the

27
28 ⁴ In 2016, the Ninth Circuit issued an unpublished decision holding that Hobbs Act robbery
qualifies as a crime of violence under § 924(c)’s force clause. *See United States v. Howard*, 2016
WL 2961978, at *1 (9th Cir. May 23, 2016).

1 robbery. By entering into that agreement and purchasing the mask,
2 the defendant would be guilty of conspiracy to commit Hobbs Act
3 robbery, but he would not have actually used, threatened to use, or
4 attempted to use force against anyone.

5 *Hunter*, 2017 WL 3159985, at *5.

6 As conspiracy to commit Hobbs Act robbery does not contain an element requiring proof
7 of the use or attempted use of physical force, it cannot qualify as a crime of violence under the
8 force clause. *See Hunter*, 2017 WL 3159985, at *5.

9 *c. Summary*

10 Because conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence
11 under § 924(c)'s force clause, and the only remaining clause that it could qualify under is void for
12 vagueness, the court will vacate petitioner's conviction under § 924(c) and corresponding 60-
13 month sentence.

14 **IV. Conclusion**

15 The court holds that petitioner's § 924(c) conviction violates due process in light of the
16 Supreme Court's holdings in *Johnson* and *Dimaya*. Therefore, resentencing is appropriate in this
17 case.

18 Accordingly,

19 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner's abridged
20 motion to vacate (ECF No. 707) be, and the same hereby is, GRANTED.

21 IT IS FURTHER ORDERED that petitioner's motion to vacate (ECF No. 716) be, and the
22 same hereby is, GRANTED.

23 IT IS FURTHER ORDERED that a resentencing hearing will be held on July 11, 2018, at
24 10:00 am in Courtroom 6A of the Lloyd D. George Courthouse in Las Vegas, Nevada.

25 IT IS FURTHER ORDERED that petitioner shall prepare and file a resentencing
26 memorandum by June 27, 2018, and the government shall prepare and file a resentencing
27 memorandum by July 3, 2018.

28 DATED June 5, 2018.


UNITED STATES DISTRICT JUDGE